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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Butte)

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CONNIE ANN RODDEN,

Petitioner,

v.

THE SUPERIOR COURT OF BUTTE COUNTY,

Respondent;

THE PEOPLE,

Real Party in Interest.

C062804

(Super. Ct. No. CM029493)

Petitioner Connie Ann Rodden seeks a writ of mandate to compel respondent superior court to grant her application for a certificate of probable cause in her pending criminal appeal. (C062053, consolidated with C062348).<sup>1</sup> After reviewing preliminary opposition and the appellate record, we informed the

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<sup>1</sup> We have taken judicial notice of the appellate records in *People v. Rodden*, case No. C062053, which includes consolidated case No. C062438.

parties we were considering issuing a peremptory writ in the first instance. (*Palma v. U.S. Industrial Fasteners, Inc.* (1984) 36 Cal.3d 171.) We conclude that respondent superior court abused its discretion in denying petitioner's application for a certificate of probable cause. We further conclude that petitioner did not knowingly and intelligently waive her right to appeal. Accordingly, we shall order the issuance of a peremptory writ in the first instance.

#### FACTUAL AND PROCEDURAL BACKGROUND

Petitioner resided in California while on interstate probation for violating the "criminal facilitation" statute for sodomy in Kentucky. (Ky. Rev. Stat. Ann. § 506.080.)<sup>2</sup> There is no evidence that petitioner had to register as a sex offender in Kentucky. Petitioner's California probation officer told

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<sup>2</sup> "506.080. Criminal facilitation.

" (1) A person is guilty of criminal facilitation when, acting with knowledge that another person is committing or intends to commit a crime, he engages in conduct which knowingly provides such person with means or opportunity for the commission of the crime and which in fact aids such person to commit the crime.

"(2) Criminal facilitation is a:

"(a) Class D felony when the crime facilitated is a Class A or Class B felony or capital offense;

"(b) Class A misdemeanor when the crime facilitated is a Class C or Class D felony;

"(c) Class B misdemeanor when the crime facilitated is a misdemeanor." (KRS § 506.080)

petitioner she was required to register in California under Penal Code section 290.018, subdivision (b),<sup>3</sup> because her Kentucky offense would require registration in California. (Pen. Code, § 290.005.)<sup>4</sup> According to the probation officer, petitioner refused.

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<sup>3</sup> Penal Code section 290.018, provides, in relevant part:

"(b) Except as provided in subdivisions (f), (h), and (j), any person who is required to register under the Act based on a felony conviction or juvenile adjudication who willfully violates any requirement of the Act or who has a prior conviction or juvenile adjudication for the offense of failing to register under the Act and who subsequently and willfully violates any requirement of the Act is guilty of a felony and shall be punished by imprisonment in the state prison for 16 months, or two or three years."

<sup>4</sup> Penal Code section 290.005 provides, in relevant part:

"The following persons shall register in accordance with the Act:

"(a) Any person who, since July 1, 1944, has been, or is hereafter convicted in any other court, including any state, federal, or military court, of any offense that, if committed or attempted in this state, *would have been punishable as one or more of the offenses described in subdivision (c) of Section 290, including offenses in which the person was a principal, as defined in Section 31.*

"(b) Any person ordered by any other court, including any state, federal, or military court, to register as a sex offender for any offense, if the court found at the time of conviction or sentencing that the person committed the offense as a result of sexual compulsion or for purposes of sexual gratification.

"(c) Except as provided in subdivision (d), any person who would be required to register while residing in the state of

Petitioner was charged with failure to register as a sex offender within the meaning of Penal Code section 290.018 and various misdemeanor counts.

Petitioner's trial counsel initially argued that the Kentucky offense did not qualify as one or more of the offenses described in Penal Code section 290, subdivision (c). However, at the conclusion of the preliminary hearing, the trial court announced that petitioner's Kentucky conviction was equivalent to a violation of Penal Code section 266j, a registerable offense.<sup>5</sup>

On May 19, 2009, petitioner was sentenced to the upper term of three years in prison. Notice of appeal from sentencing was filed by trial counsel on May 27, 2009. A second notice of appeal and request for certificate of probable cause was filed by appellate counsel on July 14, 2009, and denied on the same day.

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conviction for a sex offense committed in that state." (Italics added.)

<sup>5</sup> Penal Code section 266j provides:

"Any person who intentionally gives, transports, provides, or makes available, or who offers to give, transport, provide, or make available to another person, a child under the age of 16 for the purpose of any lewd or lascivious act as defined in Section 288, or who causes, induces, or persuades a child under the age of 16 to engage in such an act with another person, is guilty of a felony and shall be imprisoned in the state prison for a term of three, six, or eight years, and by a fine not to exceed fifteen thousand dollars (\$15,000)."

## DISCUSSION

### I.

Review of a trial court's order denying an application for a certificate of probable cause is properly raised by a petition for writ of mandate in this court. (*In re Brown* (1973) 9 Cal.3d 679, 683.)

### II.

Respondent superior court erred in denying appellate counsel's application for a certificate of probable cause because the question of whether there was a factual basis for petitioner's plea was a proper challenge to the validity of the plea.

Penal Code section 1237.5 limits appeals following guilty pleas to "reasonable constitutional, jurisdictional or other grounds going to the legality of the proceedings," if the defendant files the requisite statement showing such grounds and the trial court issues a certificate of probable cause. (Pen. Code, § 1237.5; Cal. Rules of Court, rule 8.304(b).) The purpose of this requirement is to preclude appeals that do not raise issues cognizable after a guilty plea or those which are "clearly frivolous and vexatious." (*In re Chavez* (2003) 30 Cal.4th 643, 647; *People v. Panizzon* (1996) 13 Cal.4th 68, 75-76 (*Panizzon*).) It is an abuse of discretion to refuse to issue a certificate of probable cause if a statement presents an issue that is not clearly frivolous and vexatious, even if the trial

court believes the contention is not meritorious. (*People v. Holland* (1978) 23 Cal.3d 77, 84; *People v. Ribero* (1971) 4 Cal.3d 55, 63, fn. 4.)

In this case, the request for a certificate of probable cause cited the inadequacy of the factual basis for petitioner's plea to count 1, failure to register as a sex offender within five days due to her Kentucky conviction for "facilitating sodomy," within the meaning of Penal Code sections 290, subdivision (b), 290.005, subdivision (a) and 290.018, subdivision (b). The application contended that the trial court erred in determining that the Kentucky conviction for facilitation of sodomy was equivalent for registration purposes to procurement of a child under Penal Code section 266j. (Ky. Rev. Stat. Ann, §§ 506.080(1), 510.070.)

We agree with petitioner that the trial court's conclusion is arguably incorrect, inasmuch as procurement of a child in California is a specific intent crime. (CALCRIM No. 1152.) In Kentucky, it is possible to be convicted of criminal facilitation by mere reckless indifference. (*Dixon v. Commonwealth* (Ky. 2008) 263 S.W.3d 583, 586 ["As we have explained, the chief difference between complicity and facilitation is intent: '[u]nder the complicity statute, the defendant must intend that the crime be committed; under the facilitation statute, the defendant acts without such intent.' Thus, we have described facilitation as 'reflect[ing] the mental

state of one who is "wholly indifferent" to the actual completion of the crime'" ] fn. omitted.)

This argument, standing alone, cannot be said to be clearly frivolous or vexatious. It was an abuse of discretion to deny the certificate of probable cause for this contention.

Moreover, assuming that the counter argument is that this contention was forfeited by petitioner's counsel's failure to object to the court's finding, it was clearly ineffective assistance of counsel, an issue that is cognizable on appeal after the certificate is issued, even if not mentioned in the initial application. (See, e.g., *People v. Lovings* (2004) 118 Cal.App.4th 1305; *People v. Cole* (2001) 88 Cal.App.4th 850.)

Real party does not address the merits of this issue because as "a term and condition of her plea, petitioner explicitly waived 'any direct appeal [she] may have, absent any appeal to sentencing error.'"

We are familiar with the appellate waiver reflected in the use of this form. "To be enforceable, a defendant's waiver of the right to appeal must be knowing, intelligent and voluntary. [Citations.]" (*Panizzon, supra*, 13 Cal.4th 68, 80.) The voluntariness of a waiver is a question of law which appellate courts review de novo. [Citations.]" (*Id.* at p. 80.) We note there was no mention of such a waiver in the plea colloquy in the transcript. Although waivers of a right to appeal are permissible if knowing and intelligent, it strains credulity to

argue that such a waiver of a substantial right was knowing and intelligent when a defendant is improperly advised by both the trial court and her own counsel that there is a factual basis for the plea. (See, e.g., *People v. Smith* (2003) 110 Cal.App.4th 492, 500.)

It is also apparent in this case that the only benefit petitioner received from her plea agreement to a felony was the dismissal of two misdemeanors. Assuming, without deciding, that it was legally impossible for her to be convicted at a trial of failure to register as a felon and be sentenced to state prison, receipt of this quid pro quo received was so irrational as to render the waiver suspect and unintelligent. (*People v. Nguyen* (1993) 13 Cal.App.4th 114, 120, fn. 4.)<sup>6</sup>

#### DISPOSITION

Let a peremptory writ of mandate issue directing the respondent superior court to vacate its postjudgment order of July 14, 2009, denying petitioner's request for a certificate of

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<sup>6</sup> Because we have determined that respondent court abused its discretion by failing to grant the certificate of probable cause on the first ground, we need not reach the validity of the other two sentencing issues or whether a certificate of probable cause is even needed to argue those issues on appeal.



probable cause, and to issue a new and different order granting that request.

\_\_\_\_\_SIMS\_\_\_\_\_, Acting P. J.

We concur:

\_\_\_\_\_NICHOLSON\_\_\_\_\_, J.

\_\_\_\_\_RAYE\_\_\_\_\_, J.